In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 883

MARY KATHRYN SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 154–155; Pet. App. 11–12) is reported at 251 F. 2d 819.

JURISDICTION

The judgment of the Court of Appeals was entered on January 30, 1958 (R. 156; Pet. App. 13). A petition for rehearing was denied on February 25, 1958 (R. 157–160, 162). By an order dated March 27, 1958, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including April 11, 1958. The petition was filed on March 31, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether it was proper to instruct that petitioner could be convicted as an aider and abettor.

2. Whether the trial court erred in failing to instruct specifically as to the credibility of an unsigned confession.

STATUTES INVOLVED

18 U. S. C. 2313 provides:

> *Sale or receipt of stolen vehicles.*
>
> Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U. S. C. 2 provides:

> *Principals.*
>
> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

STATEMENT

Petitioner was charged in a two-count indictment returned in the United States District Court for the Northern District of Texas with sales of a 1956 Buick and a 1956 Dodge moving in interstate commerce, the petitioner knowing that these automobiles had been

stolen, in violation of 18 U. S. C. 2313 (*supra*, p. 2) (R. 1–2). The jury found petitioner guilty on both counts, and she was sentenced to imprisonment for two years (R. 141–142). On appeal (R. 144), the judgment was affirmed *per curiam* (R. 156; Pet. App. 13).

1. The pertinent evidence adduced at the trial may be summarized as follows:

On or about September 19, 1956, the Buick and Dodge automobiles involved in the prosecution were stolen from an automobile company in Wichita, Kansas (R. 12–13). On September 20, petitioner had these two cars in her possession at the El Sombrero Motor Hotel in Dallas, Texas (R. 15). Cecil Adkins, the operator of a government-surplus business in Dallas, testified that, after receiving a phone call from petitioner, he went to the motor hotel (R. 15, 17–18). Petitioner stated that she wanted to sell the Buick for $1,750, but, since she did not have the title at the time, it was agreed that Adkins should pay $1,000 down and the remainder later. When Adkins returned with the $1,000 cash, petitioner said that he could also take the Dodge as part of the deal (R. 15, 16, 49). Petitioner represented that she owned both the Buick and the Dodge (R. 24). Petitioner removed the license plates from the Buick (R. 17, 25). Adkins kept the Buick for himself, and around December 1, 1956, he loaned the Dodge to Harold Roberts (R. 16, 17).

On December 19, 1956, the F. B. I. recovered the stolen Buick from Adkins, the Dodge having previously been recovered from Roberts (R. 25, 27, 72).

Adkins made two written statements regarding the transaction to the F. B. I. on December 19 and 20. These were introduced in evidence as Defendant's Exhibits 1 and 2 (R. 52–54).

On December 20, 1956, F. B. I. agents took a voluntary statement from petitioner after warning her of her legal rights (R. 56–57, 87–88). Her account, according to the agents, was that she came from Wichita in her car, in which she carried discarded out-of state license plates obtained by Brinkley and her husband; that, when she started from Wichita, Brinkley was driving the Buick and her husband the Dodge; that, upon arrival in Dallas on September 20, Brinkley told her that the two cars had been stolen and that he wanted to sell them; that Brinkley and her husband drove the two cars to the El Sombrero Motel; and that she accepted $1,000 from Adkins for the cars (R. 62–64, 90–91). The agents testified that petitioner informed them that her statement was true, but refused to sign it (R. 59–61, 64–65, 78, 91).

At the beginning of the case for the defense, Defendant's Exhibits 4 through 7 were introduced to show the convictions of Brinkley and petitioner's husband for illegal transportation of the two stolen cars in interstate commerce (R. 93–102).

Petitioner testified on her own behalf as follows: She thought that her husband and Brinkley were to receive $40 per car from a dealer for driving the cars from Wichita to Dallas (R. 104). Upon arrival in Dallas, Brinkley spoke on the phone to Adkins who wanted the two cars parked at the El Sombrero (R. 106–107). Brinkley asked petitioner to go to El

Sombrero to collect the money for the cars (R. 107). When Adkins brought only $1,000 instead of the $1,500 which petitioner was supposed to receive, she phoned Brinkley to settle the matter but Adkins became nervous and left. When Brinkley arrived, he picked up the $1,000 Adkins had delivered, and she received no part of it (R. 108–109, 125).

Petitioner also testified that she did not know that the cars had been stolen when she went to collect the money from Adkins (R. 112), but that she learned this fact when she was arrested several months later in December (R. 110). Petitioner stated that, although the F. B. I. agents were "very nice" to her, she refused to sign the statement they took from her, since it referred to the two cars as stolen, and she did not know they were stolen at the time of the sale to Adkins (R. 113–114, 116–117, 128).

2. In its charge to the jury, the court, after referring to a conflict in the evidence as to the circumstances under which Adkins left the $1,000 with petitioner, stated (R. 136):

> Now, in the light of this situation we will have to further charge you on the subject of principals.
>
> Under the law, as made and provided, it is directed that whoever directly commits any act constituting an offense defined in any law of the United States, or who aids or abets, counsels and commands, induces or procures the commission of such offense is a principal.
>
> So, the question now is, under the law, was the [petitioner] aiding and abetting the other two parties to this crime which started on the

> trip to Dallas? If she was aiding and abetting knowingly and consciously, then she should be convicted at your hands. If she was innocently aiding and abetting and didn't know that the cars were stolen and was not apprised of it, then she should be acquitted.

Petitioner's counsel excepted to this part of the charge on the ground that, in order for her to be convicted as an aider and abettor, "there must be complete proof of the actual commission of the entire offense by the one that this [petitioner] is aiding and abetting, that is to say, Brinkley or Smith, and all the evidence must be proven that Smith and Brinkley committed this offense—" (R. 139–140).

Petitioner's counsel also entered this exception to the charge (R. 140):

> I feel that the Court should have told the jury that in the case of an oral statement, that it is evidence just like all the other evidence in the case, and that the government, or the jury, or defense, is not bound by such an oral statement, unless they first find that it was voluntary and not made under agitation, mistake, and that sort of thing, with reference to what she told the agents at the county jail.

The court did not alter its charge in response to either of these exceptions.

ARGUMENT

1. Petitioner contends that she could not be convicted as an aider and abettor since there was no proof that another person committed the offense which she is supposed to have aided and abetted (Pet. 4–6).

Petitioner was charged as a principal and the government's evidence was sufficient to warrant her conviction as a principal (Statement, *supra*, pp. 3–4). In an early part of its charge, the court gave an instruction upon which petitioner's conviction as a principal could be predicated.[1]

It was petitioner who introduced evidence tending to show that Brinkley was the principal in consummating the sale, and that she merely went to the El Sombrero motel to collect the purchase money for him (R. 108–109, 125). Petitioner apparently hoped that the jury would think Brinkley was the real culprit and she an innocent dupe. In this setting it was proper for the court to give the challenged instruction on aiding and abetting.

There is no conflict with the cited cases (see Pet. 5) holding that one cannot be an aider and abettor unless there is evidence that another person has committed the crime. Here, there was defense evidence tending to show that Brinkley had committed the crime as a principal. It is immaterial whether in convicting petitioner the jury thought that she was a principal under the government's evidence, or that she was an aider and abettor under the evidence adduced by the defense. In either case her conviction was proper.

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[1] "So, now, if you find and believe from the evidence, beyond a reasonable doubt, that on or about the 20th of September, 1956, at the time stated in the indictment which was read to you, that the [petitioner] did then and there sell the automobiles, knowing them to have been stolen, as charged in the indictment, then you will find the [petitioner] guilty. If you have a reasonable doubt of her guilt then you will acquit her" (R. 134–135).

2. Petitioner contends that the trial court erred in failing to give an instruction relating specifically to the credibility of her unsigned confession (Pet. 6–7). In taking exception to the charge, however, her counsel did not request such an instruction, but urged that the jurors were "not bound by such an oral statement, unless they first find that it was voluntary and not made under agitation, mistake, and that sort of thing, with reference to what she told the agents at the county jail" (R. 140). Since there was no evidence that the confession was involuntary,[2] it was not necessary for the court to submit the question of its voluntariness to the jury. Cf. *Wilson* v. *United States*, 162 U. S. 613, 624. The cited cases of *Catoe* v. *United States*, 131 F. 2d 16, 19 (C. A. D. C.), and *Tyler* v. *United States*, 193 F. 2d 24, 28 (C. A. D. C.), certiorari denied, 343 U. S. 908 (Pet. 6), hold merely that conflicting evidence as to voluntariness must be submitted to the jury.

Petitioner had testified that the confession was incorrect in referring to the cars as stolen. The court charged that she had a "right to offer testimony and the right to have it believed, and you may believe it in preference to other witnesses, or you may disbelieve it" (R. 136–137). The court also charged that "the defendant in the case is a witness just like any

[2] Petitioner did not claim that the F. B. I. agents used coercion or duress, but on the contrary testified they were "very nice" to her (R. 116). Petitioner stated that she would not sign the statement, not because she was mistaken in what she told the agents, but because they were mistaken in including in the statement remarks that the cars had been stolen (R. 116, 128).

other witness in the case and you have no right to disregard and not consider [her] testimony merely because of the interest that [she] may have to testify favorably to her cause, her testimony is to be weighed and considered with just as much care as the testimony of any other witness in the case" (R. 138). The result is that the question as to the credibility of the confession, although not specifically mentioned, was submitted to the jury in a fair and impartial manner. If the jury had believed petitioner's testimony that she did not know the cars were stolen at the time of sale, instead of the contrary version in her unsigned confession, she would have been acquitted rather than convicted.

CONCLUSION

The case was decided in accordance with settled legal principles, and no conflict in decisions is involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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